UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE: VALSARTAN PRODUCTS LIABILITY LITIGATION

CIVIL ACTION NUMBER: 19-md-02875

HEARING ON MOTION TO STAY

Mitchell H. Cohen Building & U.S. Courthouse
4th & Cooper Streets
Camden, New Jersey 08101
March 29, 2023
Commencing at 1:11 p.m.

B E F O R E: **THE HONORABLE ROBERT B. KUGLER**
UNITED STATES DISTRICT JUDGE

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Larry MacStravic, Courtroom Deputy

(PROCEEDINGS held in open court before The Honorable ROBERT B. KUGLER at 1:11 p.m.)

THE COURT: Motion to stay. Who's going to argue that on behalf -- and who wants to answer some questions on behalf of the defendants?

MS. DAVIDSON: That would be me, Your Honor, Jessica Davidson.

THE COURT: Come up.

MS. DAVIDSON: Did you say you have some questions or should I just go ahead?

THE COURT: I do, I do.

My first question is, what standard am I supposed to use? Because your reply brief is all over the place.

Page 1, you said that you need to show there's a reasonable -- reasonable possibility. Page 2, you say you have to show a strong likelihood. Page 3 you quote a case, again, possibility.

MS. DAVIDSON: So I think, Your Honor, obviously the standard for -- is similar to the injunction, which is likelihood of success on the merits.

THE COURT: That's not a possibility, though, is it?

MS. DAVIDSON: But --

THE COURT: The standard is not possibility. You're not showing there's a possibility that I was wrong. You have to show there's a likelihood of success on the merits.

You agree with that. Right?

MS. DAVIDSON: So, Your Honor, that is the standard generally for an injunction. But if you look at what courts have done in the 23(f) category, the reality is, right, that anybody who's filing a motion for stay is filing a motion for stay before a judge that certified a class, and any judge who's certified a class is going to think that the class was properly certified. So courts have faced this question of, how can I possibly say that there's a reasonable likelihood of success on the merits? If I really felt that, I wouldn't have certified the class in the first place.

THE COURT: We do make mistakes, and we correct them at times. I have.

MS. DAVIDSON: Understood. But -- so I think courts have looked for some kind of comfortable language that is some -- that enables a court to recognize that it believes it made the right decision, the defense or whoever is challenging class certification believes the court made the wrong decision, and that's why courts have used mushier language as you've indicated. All the language we used in our brief was from cases where courts have applied those standards.

THE COURT: No. I understand you've quoted the cases, but I want to understand, what's your position as to what the standard is that needs to be applied to this motion for a stay? Because they're not consistent.

When you cite the Ninth and Tenth Circuit cases about raising serious legal questions, well, that's not the same of showing a likelihood of success on the merits. They're not consistent with each other.

So which one do you think we should use in this case?

MS. DAVIDSON: I think the standard that should be used is whether there is a likelihood or a strong likelihood or whether defendants have strong arguments.

I think courts have --

THE COURT: Strong arguments and strong likelihood are not the same. Strong likelihood is a lot harder to show than a strong argument.

MS. DAVIDSON: So, Your Honor --

THE COURT: I mean, lawyers wouldn't raise an argument unless they thought it was a strong argument. You would have Rule 11 problems. But that's not the same as a likelihood of success on the merits.

MS. DAVIDSON: Right. So I understand, Your Honor. I guess what I'm trying to say is that the framework of likelihood of success on the merits does not perfectly fit into this scenario, so district courts have each gone different ways. There is no appellate case law saying when you're looking for a stay pending 23(f) reasonable likelihood or strong likelihood or anything like that.

What I will say, Your Honor, is this: Regardless of

which wording is used, we feel that we satisfy it. Right? We think we satisfy all the standards you just listed, because of two things. One is that no Court of Appeals in the United States has ever upheld a medical monitoring class. That's number one. And number two, no -- the Third Circuit and other courts, we could not find cases upholding such a complicated Venn diagram of subclasses as exist in economic loss classes.

So I think I'd be --

THE COURT: Well, you're saying it's unprecedented.

MS. DAVIDSON: Right. So I think --

THE COURT: But the case -- the facts of the case are unprecedented. The amount of contaminated medicine that was distributed is unprecedented. The amount of potential -- number of potential plaintiffs who took the medicine is unprecedented. Correct?

MS. DAVIDSON: Well, I think, Your Honor, there's a lot of mass torts involving medications that --

THE COURT: At this -- at this level? This many? Involving a complete recall of all this medication throughout the entire country?

MS. DAVIDSON: There are -- there have been many MDL proceedings involving recalled medication. I don't know if the numbers are exact. Yes, valsartan was a drug that a lot of people took, but that's not really the test at 23(f), and that's not the test at class certification. Right? The test

at class certification is the Rule 23 standard.

And so I think that regardless of which of those district courts Your Honor chooses to follow or to apply a similar standard to, we would satisfy all of them, again, because we think the medical monitoring class is unprecedented in terms of appellate courts saying over and over again, and the Third Circuit saying in -- very strongly that it doesn't know if there's any medical monitoring class that could ever be certified.

So that's the *Gates* case. And that's why I think --

THE COURT: There's no question the Third Circuit has said that it's difficult to certify a medical monitoring class, but it never says it's impossible.

MS. DAVIDSON: It did not say it's impossible. But if we're talking about --

THE COURT: Because in --

MS. DAVIDSON: I think you and I can both agree that it doesn't have to -- we're not talking about a standard where Your Honor has to say you will definitely succeed on the merits. But if we have the Third Circuit saying it's very difficult, that strikes me as satisfying any of the standards that Your Honor just laid out.

THE COURT: The Third Circuit never says that you can never do it. They say there are certain things you have to do in order to do it. Difficult to do and, you know, they reject

it in some cases because the proofs have failed in those cases. But they -- they have allowed it. Not in the medical monitoring. There's never been one that the Third Circuit, they said okay.

But you seem to be suggesting in your brief and again today that because of the complexity of this case that it shouldn't be certified as a class.

MS. DAVIDSON: That is not what we're saying, Your Honor. And I'm not sure if you're talking about the economic loss or the medical monitoring. I'm happy to address either one.

THE COURT: Either one.

MS. DAVIDSON: With respect to the economic loss, one of the biggest problems with that class, Your Honor, is that the subclasses are so complex that there is no way that there could be a trial. Right? Rule 23, you're certifying a case for a trial. And because of the way the subclasses have been designed, there are plaintiffs who fall into multiple subclasses. So it is unclear to me how you would have a trial of that plaintiff's case.

Like take, for example, a plaintiff from Connecticut. That plaintiff is in multiple subclasses. So if you were to try a subclass on express warranty, that would not resolve all that person's claims because that person is in a different subclass with different states for implied warranty or for

consumer fraud.

So it's not that the case is complex, it's that there is no -- the lot is complex. There's -- and that's the reason why you don't see classes that are certified with complex variations among state laws.

If you look at the federal jurisprudence, courts really are looking at single-state classes.

THE COURT: Well, how about that, then we just try a case that has only New Jersey causes of action.

MS. DAVIDSON: But that wasn't certified, Your Honor.

THE COURT: Well, maybe we're not done.

MS. DAVIDSON: So I can't really address a certification order that hasn't been issued. I can only talk about the classes that have been certified.

THE COURT: I'm just asking, if you're suggesting a case involving the claims for only one state at a time would survive the analysis.

MS. DAVIDSON: What I'm saying is that the legal variations is the biggest problem with the economic loss cases. I'm not saying it's the only problem.

THE COURT: That's why I'm suggesting, let's pick a state, any state. New Jersey. I don't care. We'll try only those claims that implicate New Jersey law.

MS. DAVIDSON: So, Your Honor, that would still raise concerns from our perspective in terms of the certifiability

of the claims. And if -- I don't know if you're talking about, again -- medical monitoring can't be in New Jersey.

THE COURT: No. How about the economic loss?

MS. DAVIDSON: Okay. Because of *Sinclair*.

So if you talk about economic loss and a New Jersey-only class, what are the problems?

And I would say the main problem there is that plaintiffs' entire theory is based on this concept that the drugs were worth zero. We have the FDA telling plaintiffs, continue taking their drugs. We have people who continued taking their drugs. We had a plaintiffs' expert who told us he continued taking his valsartan after the recall.

So then what do you do? How do you determine who suffered what loss in one trial? That's the factual variations. That's the second part of our briefing.

THE COURT: That's why you have a jury. Isn't that why you have a jury, to determine who wins and who loses and how much if they win?

MS. DAVIDSON: But a jury can't -- a jury can't determine in one fell swoop whether the medicine was worthless for everyone. The medicine may have had different value for different people. That's --

THE COURT: I don't know why you say that.

MS. DAVIDSON: Because in order to --

THE COURT: We ask them to do that all the time with

multiple plaintiff cases. We ask them to distinguish the plaintiffs.

MS. DAVIDSON: But how do you distinguish when you're talking about thousands and thousands of plaintiffs?

THE COURT: That's why we have witnesses and experts.

MS. DAVIDSON: But you can't bring each plaintiff into court.

THE COURT: You don't necessarily have to in a trial.

MS. DAVIDSON: So from our perspective, in terms of Rule 23(b)(3) and what predominance means, it means that common factual issues predominate. Right?

THE COURT: Right.

MS. DAVIDSON: And so if you have different plaintiffs who got different value from a medicine, then common factual issues don't predominate, and you also have a manageability problem because you can't -- the jury can't pass judgment on each of those plaintiffs. There's just too many.

So the -- you would have to have -- unless you completely accept plaintiffs' theory that all the medicine was worth zero and that's why they're -- that's why they're promoting that theory, right, because if it's all worth zero, then everybody can be decided in one fell swoop.

THE COURT: Well, that's not the only reason.

MS. DAVIDSON: But we have a due process right to defend against that.

THE COURT: There's no -- that's not the only reason they're advancing that theory. But that is their theory. And they're going to have testimony that the drug has no value because of the contamination.

MS. DAVIDSON: Correct.

THE COURT: Or adulteration, whatever term you choose to use.

MS. DAVIDSON: Correct.

THE COURT: The jury can believe that or not, depending on the evidence on the other side.

MS. DAVIDSON: Right. But under due process and under Rule 23, we have a right to present plaintiff-specific evidence of that, just like we would if there was a two-plaintiff trial.

Say there was a two-plaintiff trial and plaintiffs said the drug was worth zero. We bring in the two plaintiffs and their doctors and, you know, we would present evidence to the jury, here's why the drug had value to person A, here's why the drug had value to person B.

When you're talking about thousands of people, we lose the right to do that. We lose the ability to do that. And that's why Rule 23 was created that way, to protect due process.

THE COURT: What you seem to be suggesting is it's impossible to ever try a class action case because you would

want -- you as a defendant in any class action case, employment, whatever, you'd want to have -- to require every plaintiff to show up in court and testify about his or her claim. So you couldn't use experts. You couldn't use sampling. You couldn't use summary charts and things of that nature.

You'd have to have -- you say due process would require each and every plaintiff to show up and prove his or her case. Right?

MS. DAVIDSON: Your Honor, it would depend on the elements of the claims. So because we were talking about New Jersey, I was thinking about like the NJ CFA and ascertainable loss. Can you prove ascertainable loss on a classwide basis? And lots of courts have said you can't.

So I think it depends on what the claims are, what the causes of action are, what the theories are, and whether those causes of action can be proven on a classwide basis or whether they require individualized evidence.

THE COURT: Another point that you make in your brief is that one of the reasons you think the Third Circuit will take this and should take this is because of what you call the pressure from this Court for you to settle the case, the undue pressure. Correct?

MS. DAVIDSON: Yes, Your Honor.

THE COURT: Name me one case you've ever been

involved in in which the judge did not suggest that you and your client consider settling it.

MS. DAVIDSON: Your Honor, my understanding is --

THE COURT: Name me one case, that's my question, that you've ever been involved in in which a judge did not suggest that you and your client participate in settlement discussions.

MS. DAVIDSON: Your Honor, I think that it would be difficult for me to go through all the cases I've ever been in --

THE COURT: Because the answer is none.

MS. DAVIDSON: I don't think that's true, at least from my perspective. I don't know about the other defense counsel.

And I think that the concern that we had there was that there was language, both in the order and there has been this parallel process of settlement discovery masters where there seems to be a focus in this MDL more on settlement than on trial. And that was the concern.

THE COURT: Settlement counsel is becoming pretty standard in MDLs, isn't it?

MS. DAVIDSON: I have not had any MDLs with separate settlement counsel, Your Honor.

THE COURT: It is.

What consequences, adverse consequences, did I

threaten if you didn't, as the Third Circuit in *Laudato* term it, play along with the settlement suggestions? What consequences did I threaten?

MS. DAVIDSON: Your Honor, I don't believe that we've submitted briefing that said you threatened consequences.

THE COURT: Because I didn't, did I?

MS. DAVIDSON: I don't believe that was in the briefing, Your Honor.

THE COURT: Is that your answer to my question? Yes, I didn't threaten any consequences if you didn't settle the case?

MS. DAVIDSON: To my knowledge, I have not been involved in any conversations where that occurred.

THE COURT: You're not aware of any either, are you?

MS. DAVIDSON: I am not aware of any.

THE COURT: Okay.

MS. DAVIDSON: Your Honor, if I may? May I raise something, Your Honor?

THE COURT: Well, let me also ask you about this.

Are you aware of the new proposed Rule 16.1?

MS. DAVIDSON: I would have to look at my federal rules.

THE COURT: Well, it's not -- it's a proposed rule. It's brand new. They're starting the process. And it's a rule designed specifically for MDLs.

And it lists -- there's sort of a checklist of things that it suggests. It suggests that the judge and an MDL have early conferences and set up schedules and how to manage the case.

But one of the points it suggests that the judge and that litigants talk about is what settlement process they should use.

So discussion of settlement will be enshrined in -- as it is in Rule 16 for non-MDL cases, will be enshrined in a rule designed right for and specifically for MDLs. Okay?

So why is it improper for the judge managing an MDL to suggest to counsel that perhaps they should be considering settlement of the case?

MS. DAVIDSON: Your Honor, I think what our concern was in the briefing, and I think the briefing makes this clear, is that Rule 23 is meant for trial. I'm talking about Rule 23 right now, because we're talking about certification.

THE COURT: You raised the point about trying to nudge you into settlement. That's what I'm addressing.

MS. DAVIDSON: So, Your Honor, I have two things to say, if I may.

The first is that Rule 23 is intended for trial. The -- because the Rule 23 order referenced that class certification would promote settlement, that was a concern to defendants.

The second thing I want to say, Your Honor, is that the nature of the way the class certification order was, with 111 subclasses, to us seemed utterly impossible to try.

So the only possible purpose is to have a class settlement, because you can't have 111 trials. We have -- there was no trial plan. And so there was no indication to us of how class trials would proceed based on this order.

THE COURT: Well, we haven't decided that yet. Very specifically we said that we would talk about that, how we were going to handle these trials, at a later date, which we'd be starting today. So we haven't decided exactly the parameters of the trial yet.

And I don't know why -- I don't know why you think it's utterly impossible to try these cases.

Let's be honest here. There's some of the best lawyers in the country involved in this case. I have great confidence that working together we can figure out a way to do this and get it done.

The Court's not concerned about complex cases. Heck, I had a trial where the jury charge was 186 pages. It took me eight hours to give the jury charge. There were over 500 individual verdicts in that case. It wasn't easy, but with everybody working together, we figured out how to do it and how to make it make sense for the jury.

And I'm confident that we can certainly do that in

this case, given the level of competency of the lawyers that we have in this case. Great lawyers here. A lot of experience in complicated matters. We'll figure out how to do it.

I'm not at all concerned about the complexity of this case. All class actions are complex. If you ever take a course in complex litigation, it's mostly about class actions. That's what we do, for better or for worse. So I'm not really concerned about that, to be honest with you.

And I don't think you -- that counsel should be concerned about that either. We'll work together and get it figured out how to do this thing.

MS. DAVIDSON: Your Honor, if I may respond.

THE COURT: Sure.

MS. DAVIDSON: So first of all, Rule 23 jurisprudence expects a trial plan as part of the class action ruling so that there's an understanding of what exactly is going to be tried is the first thing I would say.

And the second thing I would say is, yes, these are great lawyers, a great Court, but court after court in America, like day after day after day, every court is holding, you can't do this. You can't have a trial with lots of different law thrown in. These multi-state trials are not feasible. Like court after court has said that. In warranty cases, in consumer fraud cases. There's nothing unique about

this case that would make a jury able to comprehend. We're talking, right, like 200 different jury instructions. If you take 50 states, four causes of action, it's just -- it's not feasible.

No court has ever found it feasible. No Court of Appeals has found it feasible. So the subclassing proposal here didn't come with a viable trial plan.

THE COURT: We're getting there.

MS. DAVIDSON: But if I could get back to the stay issue, because I think there's something really important to --

THE COURT: We're going to get to a trial plan. Okay? We'll figure it out. I'm not worried about it. I'm not dissuaded at all about the complexity of the case. And I don't think any of you should be either.

You know, it's going to be difficult, sure. There are going to be times when you just want to give up in frustration, sure. But we'll get through it. We will.

Go ahead. You wanted to say something. I interrupted. I'm sorry.

MS. DAVIDSON: I think the main thing I want to say, Your Honor, is that I looked last night at PACER at Third Circuit precedents. And the Third Circuit, over the last year, has decided 23(f) petitions within about a month usually. It takes about a month. Some of them have been

three weeks. Three to six weeks is the average.

Now, we were at five weeks. As you know, plaintiffs got two extra weeks for their opposition or we'd already know if the Third Circuit was taking this. But we're going to hear in a week or two.

So I feel in a sense like this whole concern about whether or not to say this case will be determined very quickly, because we will know very, very quickly whether the Third Circuit is going to accept 23(f). And so we may not really even need to be overly concerned as to whether the case should be stayed pending the Third Circuit deciding whether it's going to accept the appeal because we should hear any day.

THE COURT: Well, that works against you too, because what's the harm then in starting back up if in a week from now we'll know for sure? And if a week from now the Third Circuit says stop, what have we lost?

MS. DAVIDSON: Well, Your Honor, I guess I would say I'm not even sure -- I was thinking about this also -- exactly what we would start up again.

Because one of the things that I think is really important to note is that if you look at plaintiffs' cases, the reason a few of those courts -- there are a few courts that denied stays, every court that denied a stay, it was because there was discovery outstanding that would be relevant

to individual cases as well. So like depose the company, depose the plaintiff, because we're going to need that in an individual case as well.

Here, we've really done everything. Right? We -- if you look at the whole lead-up to the TPP trial, what's coming next is damages. That's a completely different analysis depending on whether there is a class, whether there's no class and the scope of the class.

So when we say start up again, there's nothing to start up again that would be useful, that would not be wasteful if class cert were reversed.

THE COURT: Let me confirm with you that what you're seeking is a stay of everything. Correct?

MS. DAVIDSON: A stay of class matters.

THE COURT: What else is there at the moment?

MS. DAVIDSON: In this litigation?

THE COURT: Yeah.

MS. DAVIDSON: Well, there are the personal injury cases, but my understanding from before I got involved is that those are not being advanced.

THE COURT: No, they're not at this point.

But other than that, what else is there? So you want everything -- you just want this to come to a halt now until we hear definitively from the Third Circuit?

MS. DAVIDSON: We are asking --

THE COURT: And we do nothing.

MS. DAVIDSON: We are asking for anything related to class issues to be stayed, because everything -- unless there are things that are relevant to individual cases, but there apparently are none outstanding at this point. Right? Because we did the liability experts and next came damages.

If you look at the Court's scheduling order, the next thing in line was damages, which is completely dependent on if there's a class, if there's not a class, what the scope of the class is.

For example, Your Honor was just saying something about a New Jersey-only class.

If that were -- if the Third Circuit were to remand and Your Honor were to do a new certification order for New Jersey only, let's just say, that would be a whole different damages analysis.

So we don't even know what we're dealing with. And the next thing in line was doing damages. We did a lot of work this year.

THE COURT: We know -- we know something about the economic loss claims. Right? It's what they paid out for these prescriptions. And they want their money back.

That's the claim. Right?

MS. DAVIDSON: But in order for us, for example, to present damages experts, we need to know who the plaintiffs

are, what's the size, what's the scope.

THE COURT: Okay. If they serve an expert report in those cases, wouldn't that lay out what their claims are?

MS. DAVIDSON: But their expert report would be tied -- what would it be tied to? To the current certification order? So we would be doing expert discovery on a certification order that the Third Circuit may decide that it wants to review. That's why I'm saying it makes sense to wait.

THE COURT: You know that the third-party payer cases are going to go on whether there's a class or not. Right? There's just too much money. They're in to it too deep, and they want their money back. They're going to -- even if they have to pursue it individually, they will. Correct?

MS. DAVIDSON: And we have done a lot of workup on those third-party cases.

THE COURT: So if we've already done all that work on the third-party payer cases, I assume you have some idea how much money they think they're owed.

MS. DAVIDSON: For the individual cases?

THE COURT: For the individual -- the individual claimants, yes.

MS. DAVIDSON: So when we were going down this path right before you issued your class cert order, we were going to do damages, experts, for what we thought was a named

plaintiff only trial this summer with, you know, the two assignors I think it was. And we were going to do damages reports on that.

But then, right before we were starting to talk to our experts, right, this order came down. And then we no longer knew whether we -- what the target was. Was the target a class, or was the target these named plaintiffs?

So we could do damages discovery on the named plaintiffs. That's single -- but that's not class discovery.

THE COURT: No, I get that. I'm just trying to figure out -- I'm trying to understand how much more would be involved if it proceeded as a class than what you've already done.

You're telling me that it's just a lot, but I'm trying to get some more details as to what do you mean, there's a lot that needs to be done and we shouldn't do it until we know for sure.

MS. DAVIDSON: What I'm saying is it's a completely different expert opinion from these experts. We'd be paying experts to do a damages opinion on a class when we don't even know, first of all, what the class is. We don't know which subclass the Court is considering trying.

There's no -- we don't -- our experts wouldn't have a clear target of what they are writing a report about. Whereas if we determined -- if the Court denies 23(f), then we know.

If the Court grants 23(f), then when we know that it's not -- you know, we need to wait and see what the Third Circuit says about these classes. But we're not --

THE COURT: Well, if the Third Circuit denies -- which, frankly, I think it will. But if they do, then the experts -- well, we're going to have to focus -- and I wanted to start that today -- on the exact case we're going to try and the parameters of the exact case we're going to try as a class case.

You know, when we focus on that, then the plaintiffs will know what their expert has to address and you'll know what your experts have to address. Correct?

MS. DAVIDSON: So, Your Honor, I'm afraid I don't really understand what you mean by what's the exact case we're going to try, because right now we have a certification order --

THE COURT: We're not trying all the cases at the same time. We're not going to be in some mega trial where every claim and every claimant is tried under every potential law. We're just not going to do that. I don't think anybody wants to do that.

MS. DAVIDSON: But that's what a class certification order is, so I'm just confused. Unless the Court is going to issue a new certification order that certifies smaller or different classes, I'm not sure I understand.

THE COURT: The understanding that I thought we all had was that we were going to focus now on getting something ready for trial. And we were going to figure out among all of us what that something was.

MS. DAVIDSON: And we understood that as well, but then the class cert order came down and changed the whole equation.

THE COURT: Well, it's not the case that -- you're right. It's not the case we originally were teeing up.

But -- I mean, I'm sorry that the opinion and order came down, but, I mean, that's -- the rule says I have to do that as soon as I can. And that was as soon as we can. That was -- you know, it's pretty complicated stuff.

MS. DAVIDSON: But if we're talking about a third-party payer class, and what state of third-party payers are involved? Which third-party payers against which defendants? Like the class was certified against all defendants.

THE COURT: I understand that.

MS. DAVIDSON: So the trial has to be consistent with the class certification ruling.

THE COURT: That can be amended.

MS. DAVIDSON: That's the case law.

THE COURT: That can be amended. That can be changed.

That's -- I thought that was our understanding. But apparently it's not your understanding?

MS. DAVIDSON: It was not my understanding that the Court intended to amend its class certification order, no.

THE COURT: Okay. Okay. Sorry I wasn't clear about that. I thought we were.

I think that's the plaintiffs' understanding, but we'll see. They'll get to talk soon.

Anything else you wanted to say about this motion to stay?

MS. DAVIDSON: No, Your Honor. Just that I think that we are going to have an answer very soon, and so this may be a bit of an academic discussion.

THE COURT: I hope so.

MS. DAVIDSON: Thank you, Your Honor.

THE COURT: Thank you.

Who wants to speak for plaintiffs?

MR. HONIK: Your Honor, Ruben Honik. Good afternoon. I will principally.

May I remain seated with my notes?

THE COURT: Sure.

MR. HONIK: Thank you, Judge.

THE COURT: So what was your understanding about what we're going to try classwide?

MR. HONIK: Your Honor, let me take a half step back

if I may.

And I say this respectfully. I think Ms. Davidson is just completely wrong about the implication of a class ruling. It does not oblige any judge, let alone an MDL judge, to try the entire class case.

You as an MDL judge have trial and management tools at your disposal that allows you to try such fewer claims, such fewer defendants, as is practical.

And our understanding was that you had selected MSP or we had selected and the Court had approved that MSP and two assignors would be a specific plaintiff whose individual claims would be tried as to three defendants.

That can still occur even if it has classwide implications. In other words, we can still try that. Your Honor can elect to continue to do that once we have clarity from the Third Circuit. And then it has class implications. There may be res judicata as to certain claims that Your Honor directs us to try.

So I'm merely suggesting that Your Honor has at his disposal the ability to try such fewer claims as to such number of defendants as is practicable. And that's not only permissible, but that's I think envisioned in your role as an MDL judge.

The alternative is to complete discovery and for you to send literally thousands of cases back to their respective

courts, which is something that, you know, we don't want to do. That's why we have MDLs, and that's why we have class cases.

The other thing I wanted to point out, because I'm not sure that the record reflects accurately what the standard is that Your Honor should be applying to the stay request.

That's a request for extraordinary relief that should not be given as a matter of course. And the standard, quite clearly, is that there has to be a strong likelihood, not merely a likelihood, a strong likelihood that the 23(f) petition will be granted and will succeed on the merits. It's two steps. The court -- the Third Circuit has to agree to hear it jurisdictionally in the first instance, and then there has to be a demonstration on the merits that they will succeed, meaning that you'll be reversed. And the standard there, Judge, is an abuse of discretion. The defense has to point out that the ruling was clearly erroneous, so that it's an exceptionally high bar.

We've proffered to the Court our opposition to the 23(f) so you see the basis on which we defend your ruling.

And we share the view that the Third Circuit is highly unlikely to entertain this appeal.

But for purposes of the stay and meeting the first prong of demonstrating a strong likelihood of success, it's just not there.

And that's not the only standard. They have to show that there's -- they're likely going to suffer irreparable harm absent a stay. And there's been no showing and -- no meaningful showing that that prong will be satisfied. That there's a public interest at stake. None of those prongs have been met here.

And, respectfully, Judge, there's a great deal that we can and should be doing for the very reason that Ms. Davidson suggested, namely that whether we proceed on a classwide basis or not, we have to complete certain elements in this case to get going. And whether the trial is for one TPP or a class of TPPs, there's more work to be done.

And what do I mean by that?

We have already proffered, under the Court's direction, a damage report from Dr. Conti which does two things. It gave classwide damages. It identified all the TPP losses related to the sale of contaminated valsartan, and it specifically identified the losses suffered by MSP's two assignors.

We've proffered that. We're now at a stage where the defendant should be doing the same. I mean, they have economists lined up that -- they weighed in on the class certification months ago. What needs to happen now is they need to go and have a similar report which addresses on the one hand specific TPP damages, say, for MSP and address

classwide damages.

And that's not the only thing that remains to be done, Judge. We're in the middle of Daubert briefing. It's been partially done as to ZHP/Torrent/Teva, but that briefing needs to be completed. And the Court should, until the Third Circuit weighs in, simply hold off on issuing a ruling. But the Court should have our completed Daubert briefing.

We should, as I've already mentioned, complete the damage expert reports. We've tendered ours as to the MSP/ZHP/Torrent/Teva, which was our anticipated first trial, and may still be our first trial. The defendants should now depose Dr. Conti. They in turn file should their damage reports.

We should prepare -- the plaintiffs should prepare a class notice program and have that at the ready and submitted to Your Honor so that when the Third Circuit does weigh in, and if it declines to accept jurisdiction, that Your Honor can review and approve the notice program.

We need to obtain additional fact discovery of the retailers and wholesalers. You'll recall in this case, Judge, that that was largely deferred by Judge Schneider's rulings, and we're now at the point, knowing where we are on the class side, that we need to obtain additional fact discovery from the retailers and wholesalers. Certainly we could limit it potentially to such items as profit, revenue and cost, which

goes to our UE damages. And that can be done for a single plaintiff or a class. And we need to do some targeted custodial discovery.

Finally, we need some expert discovery as to the retailers and wholesalers as well.

We think this is the range of things that we ought to be doing at this point to try to wrap this four-year-old MDL up.

And, Your Honor, I also took careful note that Ms. Davidson kept suggesting that the complexity of these subclasses was either somehow a problem or never approved by the Third Circuit.

And while you have our papers, that the case that stands out particularly in my head is the en banc Third Circuit decision in *In re School Asbestos* cases, which involved 14,000 schools, over 50 defendants, all up and down the supply chain, a great -- a number much greater than the ones involved in our supply chain, and an en banc panel of the Third Circuit affirmed that 23(b)(3) class certification.

So the idea that the mere number of subclasses is somehow insuperable, that it can't be managed, is simply not the case. And while I think we can all agree these are complex cases and there are a lot of moving parts, that doesn't make trial management of it insuperable.

THE COURT: I'm not worried about trial management.

Did you want to respond? It's your motion. Do you want to respond to his arguments?

MS. DAVIDSON: Your Honor, I think we're mostly debating the merits of a class certification ruling as opposed to talking about the stay.

I just want to say from, like, a practical perspective, I think in a few days we'll know if the Third Circuit hears this. And so I think that is the most prudent course to take, is to just wait and see what the Third Circuit says in a couple days.

THE COURT: Well, we don't know when the Third Circuit's going to act. I mean, it's a -- it is a little more complex than other class actions that are -- I'm sure have been considered by the Third Circuit, but we don't know.

MS. DAVIDSON: Weeks instead of days. It should be a few weeks.

THE COURT: I mean -- yeah.

MS. DAVIDSON: If we sort of turn the engines back on and start working on damages experts, right, we're going to need some time to do that, but -- so we would start doing that. And we'll hear very shortly.

But you're right, Your Honor, it could be a few weeks. A few days to a few weeks would be my estimate.

THE COURT: We hope.

MS. DAVIDSON: Thank you.

THE COURT: We don't know. Thank you.

All right. I'm going to deny the application for a stay in this matter. I don't think defendants have met the standard, the likelihood of success on the merits.

I mean, this has been a reargument of the Court's decision in the certification motions. I still believe that we are correct.

I get it. This is -- this is an unusual case. There aren't many cases like this that the Courts of Appeals have considered. But I think we were very careful in our analysis of the various classes and subclasses and the grouping that we tried to do, and I don't think the defendants have shown a likelihood of success on the merits in this case, so I'm going to deny it.

Plus I don't -- you know, if -- as we hope we have a decision soon, there isn't going to be a whole lot of work that gets done before that anyway. And if they -- the Third Circuit grants the petition and we have to crawl to a stop, we'll have not done a whole lot of work before that happens. So let's get on what we need to do.

So that's the next issue, is now what do we need to do.

Mr. Golomb, you've indicated some things you think we need to do.

Do the defendants have any ideas as to what they

would like to do?

MR. OSTFELD: Your Honor, Greg Ostfeld.

I believe it would probably be prudent for us to do what we've been doing throughout the MDL, which is plaintiffs and defendants should meet and confer and we can get back to Your Honor on short order with a proposal.

We understand you're denying the stay, and we understand that means we need to get moving. So I think it would be prudent for us to meet, discuss Mr. Honik's ideas, discuss defendants' ideas we can bring to the table, and put a proposal in front of Your Honor for what can get started now.

THE COURT: I assume that plaintiffs are agreeable to trying to work that out. Correct?

MR. HONIK: Yes, Your Honor.

THE COURT: How much time do you need to present a proposal?

MR. OSTFELD: Your Honor, my experience has been we're usually able to schedule a meeting within a week or so and hash things out over the course of another week or so. So if we could report back to the Court in about 21 days, I think that would be a good amount of time for us to put either a joint proposal or competing proposals together for the Court.

MR. HONIK: It feels like a stay. I think we --

THE COURT: How about 14 days?

MR. HONIK: How about 14 days?

THE COURT: Let's do 14 days.

MR. OSTFELD: Understood.

THE COURT: I'll hear from you in 14 days either you have an agreement that you -- a consent agreement you submit to me or you have competing proposals, and then we'll figure it out from there. Okay?

MR. HONIK: Very good, Judge.

THE COURT: Thank you.

MR. OSTFELD: Thank you, Your Honor.

THE COURT: Anything else we need to talk about today? It's a beautiful day out there. Amazing.

MS. LOCKARD: Nothing I'm aware of, Your Honor.

THE COURT: And baseball season opens. I mean, we're ready to go. Right?

All right. Thank you, everybody. It's good to see everybody. I hope you all stay well.

RESPONSE: Thank you, Your Honor.

THE DEPUTY CLERK: All rise.

(Proceedings concluded at 1:52 p.m.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Ann Marie Mitchell *30th day of March, 2023*
Court Reporter/Transcriber *Date*

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